No. 16-1441

IN THE

Supreme Court of the United States

JAMES CARRASCO; ADRIAN DOMINGUEZ; CHRISTOPHER FOSTER; CRAIG KAISER; JOSE VAZQUEZ; AND JASON WEIERS,

Petitioners,

v.

ERNEST JOSEPH ATENCIO, surviving father of ERNEST MARTY ATENCIO, *et. al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL SHERIFFS' ASSOCIATION AND ARIZONA SHERIFF'S ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The importance of uniform standards for the assessment of constitutional liability cannot be overstated. Law enforcement professionals encounter dangerous and volatile situations every day, and having the ability to assess the constitutionality of their conduct – whether working alone or in cooperation with others – is essential. Unfortunately, the Ninth Circuit's "integral participation" doctrine results in both a unique and uncertain assessment of constitutional liability where officers who have neither inflicted constitutional injury nor caused others to do so are saddled with liability, and denied their entitlement to qualified immunity in the process. The National Sheriffs' Association and the Arizona Sheriff's Association join in urging this Court to review and disapprove "integral participation," and restore uniformity across the Nation to the assessment of constitutional liability and qualified immunity.

For *Amici*, the differing and inconsistent application of "integral participation" means that a law enforcement officer entitled to qualified immunity in the Second Circuit, may not be afforded that same immunity in the Ninth Circuit. Additionally, for those Circuits that utilize "integral participation," an agency's training on clearly established law does not save the officer who has some involvement in a law enforcement

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[1] Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party has written this brief, in whole or in part, and that no person or entity, other than *amici curiae*, their members, member-constituted liability carrier, or their counsel, has made a monetary contribution to the preparation of this brief. Counsel for *amici curiae* has filed letters with the Clerk of the Court providing notice of intent to file this brief, and showing unanimous consent to its filing by all parties associated with the pending petitions for writ of certiorari.

action, but is unaware of a constitutional violation being committed, and, furthermore, is in no position to stop it. Much like the Ninth Circuit's recently rejected "provocation rule," *see, County of Los Angeles, Calif. v. Mendez,* 137 S.Ct. 1539 (2017), the "integral participation" doctrine is unnecessary, and leads to uncertain and inconsistent results on important issues of constitutional liability.

The *amici curiae* have a strong interest in cases, such as this, that have a direct effect on law enforcement training, the delivery of public safety services in communities nation-wide, and liability and risk management issues for local law enforcement agencies.

The National Sheriffs' Association is a 26 U.S.C. § 501(c)(4) non-profit organization formed in 1940. The National Sheriffs' Association works to promote the fair and efficient administration of criminal justice throughout the United States, and to promote, protect, and preserve the many Offices or Departments of our country's Sheriffs. The National Association has over 21,000 members and is a strong advocate for over 3,000 individual Sheriffs located throughout the Nation. Over 99% of the National Association's member Sheriffs are directly elected by the citizens living in the respective local counties, cities, and parishes. The National Association promotes the public-interest goals and policies of law enforcement in our Nation, and it participates in judicial processes (such as this case) where the vital interests of law enforcement and its members are at stake.

The Arizona Sheriff's Association is a 26 U.S.C. § 501(c)(6) non-profit organization that, like the National Organization, promotes the interests and improvement of operations of the Fifteen Elected Sheriff's serving communities in the State of Arizona.

The Nation's Sheriffs spend a significant amount of time and public monies training their personnel in adherence to constitutional mandates. This training is necessary to foster public safety, including the safety of citizens, officers, and the suspects encountered every day. This training aims to develop the individual Sheriff's Deputies' understanding of the clearly established law that guides their decision-making. In this regard, it is commonly understood that in the defense of lawsuits arising from law enforcement activities, Sheriffs and their Deputies often assert the defense of "qualified immunity." The Ninth Circuit's expansion of constitutional liability diminishes the application of qualified immunity to officials who have not themselves violated clearly established constitutional rights. As a matter of public policy, Sheriffs and their Deputies must be encouraged to act when enforcing the law without the fear of personal liability except in those cases where they transgress the bright-lines of constitutionally permissible behavior. The decision in this case, if not reversed, has far-reaching adverse effects on the Sheriffs in our Nation and the legions of law enforcement personnel under their command who strive to follow constitutional principles, while also relying on qualified immunity to provide them the freedom to act in difficult situations, often with uncertain outcomes.

SUMMARY OF ARGUMENT

The lower court relied on the Ninth Circuit Court of Appeals' integral participation doctrine to deny qualified immunity to the Petitioner law enforcement officers who attempted to gain control of Atencio as he struggled to avoid handcuffing. (Pet. Carrasco *et. al*., App. 9a). Under this doctrine, an official who is deemed to be an "integral participant" to an underlying law

enforcement action may be held personally liable under 42 U.S.C. § 1983 for another's unlawful act, even if the official's own conduct does not rise to the level of a constitutional violation. *Boyd v. Benton Cty.,* 374 F.3d 773, 780 (9th Cir. 2004). The Ninth Circuit Court of Appeals, in turn, relied on "integral participation" to deny qualified immunity to the Petitioner law enforcement officers. (Pet. Carrasco, *et. al.,* App. 1a).

Under the Ninth Circuit's "integral participation" doctrine, a law enforcement officer can be held liable as an integral participant, even if the officer has not committed a constitutional violation, caused a violation, or is aware that a violation will be, or has been, committed by another. This rule is troublesome in an era where law enforcement personnel must work cooperatively with others to achieve legitimate public safety goals, but may lack information necessary to appreciate an existing issue of constitutional dimension. With "integral participation," anytime an officer works with members of the officer's own agency, or cooperates with other agencies, that officer runs the risk of personal liability for the acts of others – even if following clearly established law.

This rule is not only legally flawed, but results in an inconsistent assessment of both constitutional liability and qualified immunity among the Nation's various appellate circuits, and among the lower courts in the Ninth Circuit's geographical boundaries.

1. The integral participation doctrine violates the long-accepted notion that § 1983 liability can only be based on personal participation in constitutional wrongdoing. A hallmark of § 1983 liability is that each defendant is responsible only for their own misconduct of constitutional dimension. *See Monell v. Dep't of Soc. Servs*., 436 U.S. 658 (1978); *Ashcroft v. Iqbal*, 556 U.S.

662 (2009). Under § 1983, liability is imposed only upon a person who "subjects, or causes to be subjected" another to a constitutional violation. The Ninth Circuit's "integral participant" doctrine improperly allows for the imposition of constitutional liability where a defendant has not subjected another, or caused another to be subjected to, a constitutional violation. *Boyd, supra*. This Court has never endorsed, or even addressed, such a notion.

2. A corresponding hallmark of constitutional liability is that one government official is not vicariously liable for the constitutional misconduct of another. *See, Monell, supra.; Rizzo v Goode,* 423 U.S. 362 (1976). Yet, that is exactly what the lower court did here. Integral participation was applied to hold law enforcement personnel, whom plaintiffs agreed did not personally act unconstitutionally, responsible for the alleged constitutional misconduct of others. *Monell*, and its progeny forbid this.

3. This Court has repeatedly stressed the importance of qualified immunity, and the standards guiding its proper application. *White v. Pauly*, 137 S.Ct. 548 (2017); *Mullenix v. Luna,* 136 S.Ct. 305 (2015); *Reichle v. Howards,* 566 U.S. 658, ___, 132 S.Ct. 2088 (2012). The standards include an entitlement to qualified immunity where the conduct at issue does not violate clearly established law, *Pearson v. Callahan,* 555 U.S. 223, 231 (2009), which must not be defined at a high level of generality, *Mullenix,* 136 S.Ct. at 308, and where the immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986). The idea that a law enforcement officer may be denied qualified immunity upon a doctrine that requires neither constitutional misconduct, nor actual

knowledge of another's impending misconduct, cannot be squared with the entitlement to qualified immunity as defined by this Court.

4. Integral participation undermines the directness requirement of proximate causation. *Anza v. Ideal Steel Supply Corp.,* 547 U.S. 451 (2006); *Holmes v. Securities Inv'r Prot. Corp.,* 503 U.S. 258 (1992). Because integral participation eliminates any requirement to show that an individual's own misconduct led directly to an injury, one of two scenarios occurs: either the officer is held responsible for damages based on his own constitutionally permissible conduct; or is held liable for damages proximately caused by another's constitutionally impermissible behavior. Either way, the result is contrary to established principles of proximate cause.

ARGUMENT

The Ninth Circuit's "integral participation" doctrine is contrary to settled § 1983 law concerning individual culpability and the prohibition against vicarious liability. It diminishes the entitlement to qualified immunity by eliminating a law enforcement official's ability to anticipate which conduct may give rise to constitutional liability. It also circumvents proximate cause; holding officers accountable for damages based on their own permissible conduct, or for the improper conduct of others that is the cause of the injury.

I. THE INTEGRAL PARTICIPATION DOCTRINE IMPERMISSIBLY EXTENDS CONSTITUTIONAL LIABILITY.

A. The doctrine improperly extends liability to those who have not subjected another, or caused another to be subjected to, constitutional injury.

§ 1983 applies to those who "subject[], or cause[] to be subjected," a citizen or other person within the jurisdiction to a violation of rights and privileges guaranteed by the Constitution. To be liable under § 1983 there must be a showing of personal participation in the alleged rights deprivation: there is no *respondeat superior* liability. *See Monell, supra.* (rejecting the concept of *respondeat superior* liability in the § 1983 context and requiring individual liability for the constitutional violation). "Section 1983 provides a cause of action against state actors who violate an individual's rights under federal law." *Filarsky v. Delia*, 566 U.S. 377, 380 (2012); *accord Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 122 (1992) ("[t]he city is not vicariously liable under § 1983 for the constitutional torts of its agents: It is only liable when it can be fairly said that the city itself is the wrongdoer"); *see also, Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 723 (1989) (a person who was responsible for a deprivation of constitutional rights is liable to the party injured in any action at law.).

Ninth Circuit "integral participation" attaches constitutional liability in a different, and much broader, way than this Court's precedent allows. By removing the need to show a constitutional violation through an individual's own misconduct, integral participation permits claims against certain defendants that could

not succeed on their own terms. *See, e.g., Mendez*, 137 S.Ct. at 1547 (disapproving the "provocation rule" for the reason that it allows an excessive force claim under circumstances where no such claim could exist on its own).

This alone merits disapproval of the doctrine.

B. The doctrine is too vague, ill-defined, and inconsistently applied to constitute a standard sufficient to assess an individual defendant's constitutional culpability.

The Ninth and Fifth Circuits rely on integral participation to impose constitutional liability on those participating in a police action, without requiring that "each officer's actions themselves rise to the level of a constitutional violation." *Boyd,* 374 F.3d at 780; *see also, James ex rel. James v. Sadler,* 909 F.2d 834, 837 (5th Cir. 1990) (officers providing armed backup during an unconstitutional search were "integral" to that search, and were therefore participants); *Melear v. Spears*, 862 F.2d 1177, 1186 (5th Cir. 1989) officer who does not enter an apartment, but stands at the door armed with his gun while other officers conduct the search, can nevertheless be a "full, active participant" in the search).

Other circuits have not followed the Ninth and Fifth. In the context of excessive force, the Eleventh Circuit concluded that only an officer who uses excessive force or who is in a reasonable position to intervene to stop the use of excessive force is precluded from his otherwise presumed protection under the doctrine of qualified immunity. *Ensley v. Soper*, 142 F.3d 1402, 1407-08 (11th Cir. 1998) (reversing denial of qualified immunity for police officer whose actions

did not constitute a constitutional violation and who had no reasonable opportunity to intervene to prevent another officer from using excessive force). Likewise, courts in the Second and Sixth Circuits have either rejected integral participation, or have endorsed constitutional liability based on personal responsibility in unlawful conduct. *Ghandi v. Police Dep't of Detroit*, 747 F.2d 338, 352 (6th Cir. 1984), *cert. denied*, 484 U.S. 1042 (1988) (mere presence at the scene of a search, without a showing of direct responsibility for the action, will not subject an officer to liability); *see also*, *Wright v. Smith,* 21 F.3d 496, 501 (2nd Cir. 1994) (Newman, C.J.) ("[i]t is well settled in this Circuit that personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983 . . . .); *see also, Howard v. Schoberle*, 907 F.Supp. 671, 682 n.6 (S.D.N.Y. 1995) (specifically declining to apply *Sadler* and/or *Melear* to find a back-up officer liable under the Fifth Circuit's broader-based theory of liability, and noting the Fifth Circuit's acknowledgement of conflict between its rule and other federal circuits).[2]

Even within the Ninth Circuit's territorial jurisdiction, lower courts do not apply the doctrine with uniformity. For example, providing armed back-up in connection with law enforcement activities may or

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[2] *Amici* did not locate any cases from the Courts of Appeal for the First, Third, Fourth, Seventh, Eighth, Tenth, or District of Columbia Circuits expressly endorsing "integral participation." Although not affirmatively adopting "integral participation" as a theory or doctrine, the Eighth Circuit, in an unpublished opinion, determined that summary judgment could not be granted a group of officers participating in a search where "there is also a material dispute of fact as to whether appellants participated in an unreasonably-conducted search." *Johnson v. Davis*, 1999 WL 86184, at *2 (8th Cir. 1999).

may not result in a finding of integral participation. *See Howell v. Polk,* 2006 WL 463192 (D.Ariz. 2006), *aff'd on other grounds,* 532 F.3d 1025 (9th Cir. 2008) (officer who never entered home, and remained outside as armed back-up, held to be integral participant in a home entry and search; advance knowledge of tactical plan not necessary for liability); *Gallagher v. City of Winlock, Wash.,* 287 Fed.Appx. 568, 578 (9th Cir. 2008) (merely guarding back door during search may be sufficient to constitute integral participation); *compare, Monteith v. County of Los Angeles,* 820 F.Supp.2d 1081 (C.D.Cal. 2011) (police officers providing armed back-up to social worker removing minor without court order held not integral participants); *Aragonez v. County of San Bernardino,* 2008 WL 4948410 (C.D.Cal. 2008) (providing cover during detention or arrest held insufficient to constitute integral participation).

For *Amici*, the doctrine's lack of uniform acceptance among the circuits, and no uniform application within the Ninth Circuit, supports the need for review, and is strong evidence the doctrine is too vague and ill-defined to be an effective or proper means to assess constitutional liability.

II. INTEGRAL PARTICIPATION CONFLICTS WITH WELL-SETTLED § 1983 CASE LAW BY RENDERING OFFICIALS VICARIOUSLY LIABLE FOR THE CONDUCT OF OTHERS.

That § 1983 has been interpreted by this Court as one based on personal, rather than vicarious, liability has been the law since the late 1970s.

In *Rizzo v. Goode*, 423 U.S. 362, 371 (1976) – a case involving requested injunctive relief against city officials to prevent the continuation of alleged violations of citizens' civil rights by police officers in the course of employment – the Court reversed the grant of such relief because, in part, the requisite "affirmative link" between the officials in question and the acts complained of was not shown. Two years after *Rizzo,* this Court declared that Congress did not intend for the Civil Rights Act of 1871 to hold local governments liable for constitutional violations committed by their agents or employees. *Monell,* 436 U.S. at 692-695. Vicarious liability under the doctrine of *respondeat superior* was specifically held inapplicable to suits against municipalities under § 1983, with the Court holding that a municipality could be held liable under § 1983 only for its own violations of federal law. *Id.* at 694.

This Court reiterated that conclusion in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). "Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Id.* at 677.

Yet, "[i]n the Ninth Circuit, a plaintiff may hold multiple police officers liable when at least one officer violates the plaintiff's constitutional rights based on an 'integral participant' theory of liability." *Bresaz v. Cty of. Santa Clara*, Case No. 14-cv-3868-LHK, 2015 WL 1230316, at *3 (N.D. Cal. Mar. 17, 2015) (*citing Chuman v. Wright*, 76 F.3d 292, 295 (9th Cir. 1996)).

The Ninth Circuit's application of "integral participation" runs afoul of precedent by imposing vicarious liability upon individual officials for the acts of others.

III. INTEGRAL PARTICIPATION IS INCOMPATIBLE WITH THIS COURT'S HOLDINGS ON QUALIFIED IMMUNITY AND THE REPEATED WARNINGS TO PROPERLY ASSESS PUBLIC OFFICIALS' ENTITLEMENT TO QUALIFIED IMMUNITY.

A central objective for *Amici* is to promote the fair and efficient administration of criminal justice nationwide. That is achieved, in part, through programs fostering training and education in modern law enforcement, including training on clearly-established constitutional law. "The general rule of qualified immunity is intended to provide government officials with the ability 'reasonably [to] anticipate when their conduct may give rise to liability for damages.'" *Anderson v. Creighton*, 483 U.S. 635, 646 (1987), *citing*, *Davis v. Scherer,* 468 U.S. 183, 195 (1984). "Integral participation" removes the officer's ability to anticipate when his or her conduct may give rise to liability, and instead places the officer in the untenable position of avoiding participation in law enforcement activities with others, or participating and possibly absorbing liability for the misconduct of others – a choice qualified immunity was designed to eliminate.

The doctrine of qualified immunity shields officials from civil liability so long as their conduct "'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson,* 555 U.S. at 231 (*quoting Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). The "clearly established" standard, properly assessed, protects the balance between the vindication of constitutional

rights and government officials' effective performance of their duties. *Anderson,* 483 U.S. at 639.

A clearly established right is one that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle,* 566 U.S. 658, ___, 132 S.Ct. 2088, 2093 (internal quotation marks and alteration omitted). Existing precedent must have placed the statutory or constitutional question beyond debate. *Ashcroft v. al–Kidd,* 563 U.S. 731, 741 (2011). Qualified immunity must be evaluated in the light of what the officer knew at the time he acted, not on facts discovered subsequently. *See White v. Pauly*, 137 S.Ct. at 550; *Kingsley v. Hendrickson,* 135 S.Ct. 2466, 2474 (2015). With this, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley,* 475 U.S. at 341.

This Court need look no further than its recent decision in *White v. Pauly* to see how "integral participation" changes the outcome of this Court's qualified immunity assessment. *White* held that a third officer was entitled to qualified immunity after shooting the plaintiff's decedent, 137 S. Ct. at 552. In *White,* two other officers[3] had responded to Pauly's house, demanding that he and his brother exit the home, but without identifying themselves as police. Pauly and his brother, ostensibly defending themselves, got their weapons and shouted "[w]e have guns." When the third officer arrived, he was not aware of what had taken place, and when Pauly opened a window and pointed his handgun, the third officer shot and killed

[3] This Court expressed no opinion on whether the other two officers on the scene were entitled to qualified immunity. *Id.* at 552-53.

him. This Court held the third officer's conduct did not violate clearly established law, despite his failure to shout a warning before using deadly force. *Id.* at 552. The Court also held clearly established law does not prohibit a reasonable officer who arrives late to an ongoing police action from assuming that proper procedures were followed before his arrival. *Id.*

Applying the "integral participation" doctrine to the *White* facts, there is no question the third officer was an integral participant in the law enforcement activity, and that his act – shooting – caused Pauly's death. Under the Ninth Circuit's doctrine, qualified immunity would be denied the third officer, although he had committed no constitutional violation under this Court's existing analysis. The Ninth Circuit's integral participation doctrine, which serves to deny qualified immunity when an official has engaged in no unconstitutional misconduct, is inconsistent with the entitlement to immunity as defined by this Court.

"Integral participation" creates real-world problems for officers in the field. When faced with a given situation, the question the officer must ask is, "based on what I'm facing, what does clearly established law tell me I can or can't do[4]?" The officer is entitled to know what action, if taken, can reasonably be anticipated to give rise to civil liability. "Integral participation" does not allow an officer to answer the question with sufficient certainty, and does not allow law enforcement agencies to develop training programs to assist their deputies and officers in making these difficult decisions.

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[4] Often with nothing more than a split-second to process, or perhaps only intuit, the question and answer.

When faced with a detainee's refusal to remove his socks and shoes for x-ray scanning, and the tensing of his arms, what clearly-established law guides an officer? Is he obligated to walk away and do nothing; or engage in a protracted debate over the operational necessity to remove socks and shoes? Of course not. Objectively reasonable force, not for the purpose of punishment, may be used with pretrial detainees. *See, Kingsley,* 135 S.Ct. at 2473-74. When the Petitioner Maricopa County Sheriff's Deputies observed Hanlon's and French's struggles with Atencio, should they have just stood there and watched because they did not know all pre-existing facts, or could not predict if someone else might later use excessive force? Of course not. Their actions are evaluated in light of what they knew when they acted, and are not affected by their later arrival to an ongoing police action. *See, White,* 137 S.Ct. 550-553.

"Integral participation" changes the analysis entirely. It requires Hanlon to consider whether his lawful application of a wrist-control technique will result in his own constitutional liability because someone else may unlawfully strike the detainee later. It requires the Petitioner Sheriff's Deputies to consider refraining from assisting out of concern a constitutional violation *may* have already occurred without their knowledge, or *might later* occur through someone else's spontaneous act. "Integral participation" transforms the entitlement to qualified immunity into an exercise in prescience – a requirement never imposed upon officials by this Court as part of assessing the constitutionality of an official's conduct.

Contrary to this Court's precedent, "integral participation" allows constitutional liability for the plainly competent, and those who either follow the law or are

unaware of a completed, or even future, constitutional violation by others. In this sense, "integral participation" is to "qualified immunity," as oil to water; and its demise should be hastened.

IV. INTEGRAL PARTICIPATION CONFLICTS WITH ESTABLISHED PRINCIPLES OF PROXIMATE CAUSATION.

The Ninth Circuit's doctrine is flawed as it contravenes principles of proximate causation that apply in § 1983 cases. *See, Malley,* 475 U.S. at 344, n. 7 (1986) (scope of liability under § 1983 "should be read against the background of tort liability," including principles of proximate causation). At the heart of proximate causation is "a demand for some *direct relation* between the injury asserted and the injurious conduct alleged," *Holmes v. Securities Inv'r Prot. Corp.,* 503 U.S. 258, 268 (1992) (emphasis added). "[T]he central question [the Court] must ask is whether *the alleged violation led directly* to the plaintiff's injuries." *Anza v. Ideal Steel Supply Corp.,* 547 U.S. 451, 461 (2006).

The Ninth Circuit's "integral participation" doctrine impermissibly disregards the directness requirement of proximate cause, and holds officials liable for damages that were either caused by constitutionally permissible conduct, or were caused by the constitutionally impermissible conduct of others.

In this case, Officer Hanlon's wrist-control technique, and the Sheriff's Deputies' attempts to control Atencio's hands, arms, or legs, were neither independent constitutional violations, nor causes of Atencio's death. Yet, "integral participation," fills in the gaps to impose liability for damages in the absence of proximate causation.

CONCLUSION

This Court has recognized there is no place for unwarranted and illogical paradigms in the assessment of constitutional liability. *See, Mendez,* 137 S.Ct. at 1548 (holding the "provocation rule" was an "unwarranted and illogical" expansion of constitutional rules already in place). This Court has not yet had the opportunity to repudiate "integral participation" as another such unwarranted and illogical expansion of constitutional liability. It is now time to do so.

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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